(23)

No. 539

IN THE

Supreme Court of the United States

October Term 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an incompetent person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners,

VERSUS

MAGNOLIA PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

Jeff Busby
OREL BUSBY,
Ada, Oklahoma

J. W. GORMLEY,
Dallas, Texas
Attorneys for Petitioners.

OF COUNSEL:

BUSBY, HARRELL AND TRICE,
TOUCHSTONE, WIGHT, GORMLEY & TOUCHSTONE.

E. Duncan & Co., Brief Printers, Dallas

INDEX

INDEX—Continued

Citations

Cases:

Cases:

Cases:

Cases:

STATUTES:

MISCELLANEOUS:

No. ————

IN THE

Supreme Court of the United States

October Term 1944

AMEY THLOCCO, LORIN RAY, Guardian of the Person and Estate of Amey Thlocco, an incompetent person, and OREL BUSBY, Special Guardian Ad Litem,

Petitioners,

VERSUS

MAGNOLIA PETROLEUM COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF

Amey Thlocco, by her Guardian ad litem, Orel Busby, and by Lorin Ray, duly appointed Oklahoma guardian of her person and estate, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which became final May 23, 1944, affirming the judgment of the United

States District Court for the Eastern District of Texas, Texarkana Division, dated May 12, 1943.

Opinion Below

The District Court did not file an opinion in this cause. The opinion of the Circuit Court of Appeals is reported in 141 Fed. (2) 934.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 12, 1944, and petition of appellants for rehearing was overruled on May 23, 1944.

The jurisdiction of this court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the lower courts correctly held that Amey Thlocco, an enroller restricted full blood Seminole Indian, was not entitled to invoke the Act of May 27, 1908, sec. 1, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495 (Appendix, *infra*, P. 49), imposing restriction upon certain lands and funds of members of the Five Civilized Tribes of Indians; also, the Act of January 27, 1933, sec. 8, 47 Stat. 777 (Appendix, *infra*, p. 49), authorizing the creation of a trust of property of restricted Indians

only through the approval of the Secretary of the Interior.

2. Whether such restrictions imposed upon certain lands and funds of members of the Five Civilized Tribes of Indians are confined to such funds and lands only in the State of Oklahoma, or whether such restrictions follow such funds and lands beyond the territorial limits of that state and into the State of Texas.

3. Whether the judgments of the lower Federal courts in Texas which refused to accept the status of Amey Thlocco as determined by the proper courts of Oklahoma, the state of her residence, declaring her an incompetent, are violative of the full faith and credit clause of the Federal Constitution.

4. Whether the judgments of the lower courts in Texas in holding that in the premises declared upon, the district court could ignore the status of Amey Thlocco as defined by Oklahoma, the state of her residence, and declare her a competent in Texas, is violative of Rule 17 of the Federal Rules of Civil Procedure.

5. Whether a Federal district court in Texas, which has no probate authority to appoint a guardian, as distinguished from a county or state court of Texas which does have such authority, may pass upon the status or competency of one already adjudicated incompetent by a proper court of Oklahoma.

6. Whether the judgments of the lower courts and the opinion of the Circuit Court in the premises declared upon, are inconsistent with the opinion of this Court in *Klaxon Company* v. *Standard Electric Manufacturing Company*, 313 U. S. 487, 61 S. C. 1020; especially since the public policy of both Oklahoma and Texas is to the effect that an incompetent may be divested of title to real estate only through proper guardianship sale, and there was no guardianship sale of the property involved here, either in an Oklahoma or a Texas state probate court.

7. Whether the lower courts correctly held that Art. 7425a, Revised Statutes of Texas, is properly applicable to Texas realty, title whereof was vested in a duly adjudicated incompetent resident of Oklahoma by a judicially approved compromise and settlement of a valid Oklahoma judgment, to compensate appellant for restricted funds filched by a faithless guardian, in view of the fact that the Texas Trust Act of which Art. 7425a is a part is conclusive that it was beyond the legislative intent that said Act should apply to estates in guardianship.

8. Whether the so-called trust, if there was a trust as a matter of law, was an express trust as pronounced by the Texas courts or a resulting or implied trust as contended by petitioners. Section 7425a as applied in favor of respondent depends upon the nature of the trust involved here.

9. Whether an oil and gas lease executed in Oklahoma and void in its inception under Oklahoma laws may be-

come valid by assignment to a respondent in Texas claiming to be an innocent purchaser under the laws of notice.

10. Whether the lower courts correctly held that Magnolia Petroleum Company was an innocent purchaser in the premises within the purview of Art. 6627, Revised Statutes of Texas, as the term "innocent purchaser" in such premises has been defined by the courts of Texas.

11. Whether a full blood, enrolled restricted and adjudicated incompetent Indian can ratify a void oil and gas leas and estop herself from proclaiming its invalidity by any personal act.

12. Whether the judments of the lower courts and the opinion of the Circuit Court are not in direct conflict with many opinions of this court and the opinions of other circuit courts hereinafter pointed out. If conflicting, whether the particular questions involved herein should be passed upon and settled directly by the Supreme Court of the United States.

Statement

Amey Thlocco is a duly enrolled full blood Seminole Indian, Roll No. 1516. She has always resided in Wewoka, Seminole County, Oklahoma. She received moneys from her restricted allotted lands and at the death of her full blood Indian father in 1929 she inherited certain restricted lands and moneys. Almost immediately she became a victim of swindlers, with the result that she was

duly adjudicated an incompetent and both her person and estate were placed in guardianship in 1929. Her incompetency was further declared by Federal Judge Williams whose findings were reviewed and approved by the Tenth Circuit Court of Appeals in *Kiker* v. *United States*, 62 Fed. (2) 957. (R. 115)

The first guardian of her person and estate, Hugh Barham, misappropriated approximately $16,000 of the restricted funds of Amey Thlocco. When this misappropriation was discovered, Barham was removed; his account was surcharged with the amount of his misappropriation; Kenneth Mainard was appointed his successor as guardian and ordered to institute suit against the surety of Barham in the Oklahoma district court, which he did. In this suit judgment was rendered against said surety and in favor of the estate of Amey Thlocco in the full amount of his misappropriation. (R. 115)

Thereafter, Fidelity Union Casualty Company, a Texas corporation, the surety of Barham, tendered compromise and settlement of this judgment (R. 118), which was duly approved (R. 124) by the County Court of Seminole County, Oklahoma, in which the guardianship was pending. Among the res thus tendered by the Surety Company was the fee title to certain realy in Titus County, Texas. The title to the mineral estate in one of these tracts of Texas realty is the res in controversy in this suit.

The order approving the compromise and settlement was entered November 15, 1934 (R. 124). This order recites that the court found the compromise and settlement "to the best interests of the estate of Amey Thlocco" and ordered Kenneth Mainard, her guardian, to "satisfy the judgment against the Surety Company upon delivery to him of good and sufficient deeds."

Mr. M. S. Robertson, then United States Probate Attorney at Wewoka, Oklahoma, also approved the compromise and settlement and furnished this guardian and his attorneys with a form of deed specifically designating that the deed be excuted by the Surety Company to Kenneth Mainard "as Trustee for Amey Thlocco". (R. 224) Instead of forwarding the form of deed furnished them by the United States Probate Attorney, Mr. Ledbetter, attorney for Walter Billingsley who had been appointed guardian ad litem for Amey Thlocco in the Oklahoma court, wrote a letter to Fidelity Union Casualty Company instructing it (R. 226) to execute the deed "to Kenneth Mainard, Trustee". This it accordingly did on November 15, 1934. (R. 131) Admittedly Mr. Ledbetter so instructed Fidelity Union Casualty Company to thwart the guardianship code of Texas. (R. 746) He profited by this later, in his dealings with the Magnolia on this property. (R. 748, 757)

Although this deed was duly recorded in Titus County, Texas, it was never exhibited to the County Court of Seminole County, Oklahoma, or to the United States Probate Attorney at Wewoka, Oklahoma. Kenneth Mainard

never qualified as guardian of this Texas estate of Amey Thocco nor was there an ancillary guardian in Texas ever appointed as provided by the Texas statutes. Art. 4132, 4285, Chapter 13, Revised Civil Statutes, Texas. (Appendix, *infra*, p. 64), Kenneth Mainard paid the taxes on these Texas lands out of moneys he received as Oklahoma guardian of the estate of Amey Thlocco.

On February 14, 1936, Kenneth Mainard, acting in the dual capacity of guardian and trustee for Amey Thlocco, filed in the County Court of Seminole County, Oklahoma, through his attorneys, Billingsley and Kennerly, an application to sell an oil and gas lease on 130¾ acres of these Titus County, Texas lands to Bat Shunatona of Wewoka, Oklahoma, then the law partner of Mr. Ledbetter, for $5 per acre. (R. 52) On the same day an order was entered by the County Court of Seminole County, Oklahoma, approving the sale of said lease to Shunatona; the oil and gas lease was executed on that day by "Kenneth Mainard, Trustee", for a consideration of $5 per acre. (R. 136) Mr. Ledbetter admitted he was the moving spirit in procuring the lease and owned an interest in it. (R. 748, 757) On this point the trial court found (R. 68):

> "* * * that the purchasers of the said oil and gas lease in question were Bat Shunatona and his law partner, Louis Ledbetter, both of whom had been for many years residents of Wewoka, Oklahoma, and knew all the circumstances surrounding the condi-

tions of the the title to said lands in Titus County, Texas; that the laws of Oklahoma with reference to guardianship sale or sales of trust property were not complied with, either as to the jurisdiction of Oklahoma County Courts of guardian's sales of oil and gas lease or as to the jurisdiction of District Courts of Oklahoma over the sale of oil and gas leases by a trustee."

Four days after the execution of the lease Mainard, Ledbetter and Billingsley went to Dallas, Texas and resold this mineral estate to Magnolia Petroleum Company for $50 per acre. On this point the trial court found (R. 70):

"5 That the said original lease shows on its face that it was executed in Seminole County, Oklahoma on February 14, 1936, by Kenneth Mainard, Trustee, to Bat Shunatona of Wewoka, Oklahoma, for a consideration of $5.00 per acre; that the said Kenneth Mainard, trustee and guardian together with Louis Ledbetter, appeared at plaintiff's office in Dallas, Texas, within a short time thereafter with said original lease and an assignment of the same, which assignment had been executed by Bat Shunatona in Seminole, County, Oklahoma, with the name of the assignee not filled in; that Kenneth Mainard then entered into negotiations for the sale and assignment of said lease with Charles Gladden, then vice-president of and lease purchasing agent of plaintiff; that the said Charles Gladden was a former resident of Wewoka, Oklahoma and then in the employment of the Magnolia Petroleum Company; that he was personally acquainted with Kenneth Mainard

and Louis Ledbetter and knew they were residents of Wewoka, Seminole County, Oklahoma; that the said Kenneth Mainard, trustee, offered said lease to Charles Gladden for a consideration of $50.00 per acre; that after said lease was offered to him in his office the said Gladden then consulted with Ralph Talley and examined the Magnolia's maps which were in an office other than his own; that he directed Talley to purchase the lease in question at a price not to exceed $50.00 per acre; that he then introduced Kenneth Mainard and Louis Ledbetter to Ralph Talley who concluded the negotiations for the purchase of said lease for $50.00 per acre; that one requirement made by plaintiff with reference to title was that a new assignment of the lease be procured from Shunatona with the name of Magnolia Petroleum Company written into the same as assignee."

Magnolia Petroleum Company had a branch office with a lease purchaser in charge at Wewoka, Oklahoma, at the time it purchased this lease. Petitioners contended the evidence was clear and convincing that this lease purchaser knew in advance all the facts with reference to Amey Thlocco's ownership of the lands and of the purported lease sale at Wewoka, Oklahoma. The trial court found (R. 55-56, 68-70) that the Magnolia had a district office located in Wewoka, Oklahoma; that Dow Dunaway, its lease purchaser in charge, was advised by the United States Probate Attorney in advance of the prospective sale of the lease on Amey Thlocco's Texas lands; that Dunaway in advance of the sale obtained a description

of the lands in Texas. The court further found, however, that the information he obtained as Magnolia's agent was not acquired as a part of his duties or within the scope of his employment. Dunaway died prior to the trial of the case and his evidence was not available.

The proof also showed that prior to the purported lease sale in Wewoka, Oklahoma a well for oil and gas was drilling near the Thlocco property in Texas and that Magnolia was receiving geological information and, through its agents and officials, knew the value of this lease prior to the purchase from Mainard and Ledbetter (R. 275-277). Petitioners contended that Magnolia was willing to take a chance on its title rather than have a guardian appointed for Amey Thlocco in Texas and have a public sale of the lease in Texas. Petitioners also argued that this evidence showed collusion and fraud between Mainard, Ledbetter, et al. and Magnolia in the original sale and resale of the lease to Magnolia. This evidence caused the trial court to make the following observation during the trial: (R. 420)

> "Billingsley, Ledbetter, Mainard, they were all together. I would not believe any of them. They were not taking any chances, Shunatona's check was not cleared until after Magnolia's check cleared the bank."

The checks referred to were Shunatona's check to Mainard for $653.50 and Magnolia's check to Shunatona for $6,537.50. (R. 717) These checks represented the respective sale prices of the lease.

Magnolia entered on the property and drilled a number of wells which produced. It then filed this action in the United States District Court for the Eastern District of Texas, Texarkana Division, against Amey Thlocco to quiet title to its leasehold and test its validity.

Motion to dismiss for lack of jurisdiction over the person of Amey Thlocco was filed (R. 5), in which the trial court was advised that Amey Thlocco is a full blood restricted Indian. The court refused to dismiss the action. Subsequently Magnolia filed a "Suggestion of Plaintiff of Uncertainty of Status of Defendant, Amey Thlocco" (R. 14) and therein suggested the appointment by the trial court of a guardian ad litem so it could carry on its litigation against Amey Thlocco and quiet title to its lease in a Texas Federal district court. The court found (R. 15) that Amey had been "adjudged an incompetent under the laws of the State of Oklahoma, but that her status under the laws of the State of Texas has not been determined" and then proceeded to appoint a guardian ad litem for her so Magnolia could continue its litigation against her in a Texas Court. Nowhere in its pleadings did Magnolia advise the court that Amey Thlocco was a full blood restricted Indian. Nor did it notify the Secretary of the Interior pendency of this action or make the United States Government a party defendant. *Minnesota* v. *Uinted States*, 305 U. S. 382; *United States* v. *Hellard*, 88 L. Ed. 929.

For answer to plaintiff's complaint Amey Thlocco set up her incompetency and the personal restrictions existing against her as a full blood Indian and the restricted status of the land in question. She alleged that she was the real and beneficial owner of the lands which stood wrongfully in the name of Kenneth Mainard as trustees; that the oil and gas lease to Shunatona was not executed in Oklahoma by lawful authority; that plaintiff in taking the lease knew of her ownership, or knew or was acquainted with facts sufficient to put it on inquiry; that Magnolia acquired nothing by its purchase of the lease. She prayed that the action be dismissed for want of jurisdiction over her, or, in the alternative, if it be not dismissed, that she have a cancellation of the oil and gas lease and an accounting as to, and recovery of, all proceeds resulting from the drilling of the wells less the actual cost of said drilling and operations.

In reply Magnolia filed a general denial and pleaded various Texas statutes of limitation, also ratification of the lease by Amey Thlocco.

On the question of Amey Thlocco's competency, in its findings the trial court held that although Amey had been adjudicated an incompetent person by the proper court of Oklahoma, the state of her domicile, which court had placed both her person and her estate in guardianship, nevertheless the judgment of the Oklahoma court was not binding on the Federal district court in applying the Texas statutes of limitation and adverse possession. It further held

that she was of sound mind at the time of the excution of the lease and had been continuously of sound mind down to the present time.

The trial court refused to consider or value evidence offered relative to the question of the restrictions on Amey's funds or the restrictions on lands received by her in lieu of these funds. The court took the position that petitioners were seeking to place an Oklahoma state restriction, not a Federal restriction on these lands and that the laws of the State of Texas would not recognize such. (R. 227, 228)

The trial court held for the plaintiff, Magnolia Petroleum Company,on all points and based its decision on powers of the trustee (Mainard) to transfer Texas property according to the terms of Section 7425a, Vernon's Annotated Civil Statutes of Texas (Appendix, *infra*, p. 65). The trial court held in substance that Mainard held title to the Texas property as trustee through a deed which did not disclose the names of the beneficiary and that a purchaser (Magnolia) could deal with the trustee with full reliance on his power to act by virtue of said Section 7425a supra. It also held that under the fact situation here there was neither a resulting or a contructive trust but an express trust which enabled the trustee to deal freely with such lands.

The Fifth Circuit Court upheld the decision of the trial court. It did not discuss or analyze any of the Congressional

Acts or Federal statutes hereinafter set forth relative to the protection of Indian wards of the United States Government, nor did it cite or analyze any decision of any state or federal court interpreting these Acts. On this point it said:

> "* * * But if we should assume that the land was restricted, nothing in the federal statutes nor in the decisions construing them gives warrant for appellant's claim that they operate to remove land in Texas from the operation of Texas laws, and particularly nothing in them operates as a barrier to the running of the Texas Statutes of Limitation." (R. 848)

Reasons for Granting the Writ

There are a number of far-reaching and important questions involved in this appeal. They are:

1. The question of restricting alienation on lands acquired by or for full blood restricted Oklahoma Indians in states other than Oklahoma and the method of transfer thereof. This particular question should be passed upon and settled directly by the Supreme Court of the United States.

The trial court erroneously found that the lands in question were not and never had been restricted. The Circuit Court's opinion affirmed this finding.

Amey Thlocco acquired the lands in question as the equivalent of and in lieu of restricted funds regardless

of the method of transfer from the Fidelity Union Casualty Company. The only money Amey Thlocco ever had was (a) from her own allotment, and (b) from the allotment of her father, Teewee, full blood restricted Seminole Indian, and in either case the money would have been restricted since the funds came from full blood restricted lands.[1]

These funds were under the supervision of the Secretary of the Interior, which made them restricted funds under the terms of the Act of Congress of January 27,

---

[1] "Where property in its original state and form has once been impressed with a trust, no change of that state and form can divest it of its trust character, so long as it remains capable of clear identification.

"Where land was purchased for a full-blood Choctaw Indian from proceeds of his original restricted allotment, he was an 'allottee of such lands' within statute imposing qualified restrictions on interest in restricted land acquired by inheritance or devise from allottee. Act May 27, 1908, Sec. 1, 35 Stat. 312; Act May 27, 1908, Sec. 9, 35 Stat. 315, as amended by Act April 12, 1926, Sec. 1, 44 State, 239; Act May 10, 1928, Secs. 1, 2, 45 Stat. 495.

"If statute regarding qualified restrictions on Indian land was ambiguous, the doubt was to be resolved in favor of the Indian. Act. May 27, 1908, Sec. 9, 35 Stat. 315, as amended by Act April 12, 1926, Sec. 1, 44 Stat. 239."

Ward v. **United States** (10 Cir.), 139 Fed. (2) 79, 80.

"Where land was acquired with funds derived from restricted allotment of Indian and was held under the same trust, it constituted 'lands allotted to members of the Five Civilized Tribes' within statute creating restrictions. Act May 10, 1928, Sec. 1, 45 Stat. 495."

United States v. **Williams**, (10 Cir.) 139 Fed. (2) 83.

Murray v. **Ned**, (10 Cir.) 135 Fed. (2) 407; **United States** v. **Grisso**, (10 Cir.) 138 Fed. (2) 996; **Clinkenbeard** v. **United States**, (10 Cir.) 109 Fed. (2) 730.

1933, sec. 8, 47 Stat. 777. (R. 227, 535)[2] The courts have universally held, as applied to funds of restricted Indians, that no change in the form of the property divests it of the trust and its restricted character.[3]

2. The holding of the lower courts, to the effect that nothing in the Federal statutes or the decisions interpreting them removes restricted Indian lands from the operation of local state statutes of limitation and adverse possession, is contrary to numerous decisions of this court and other circuit courts.

This question has been passed upon as federal question squarely and in contrary manner by state courts, other circuit courts, and by the Supreme Court of the United States in the following cases:

Baldridge v. *Caulk*, (1925) 237 P. 453, 110 Okl. 185;

In re Baptiste's Will, (1925) 237 P. 854, 110 Okl. 267;

Burgess v. *Bosen*, 31 Fed. Sup. (2) 352;

United States v. *Rickert*, 188 U. S. 432, 438, 47 L. Ed. 532, 536, 23 Sup. Ct. Rep. 478;

---

[2] See Sec. 6 of Act of May 27, 1908; Act of July 14, 1918; Sec. 8, Act of January 27, 1933. (Appendix, infra, p. 61).

[3] U. S. v. Gray 201 Fed. 290; U. S. v. Thurston County, County, Nebraska, et al, 143 Fed. 287; U. S. v. Fitzgerald, 201 Fed. 295; 2 Perry on Trusts, 835, 836, 837; Three Foretops v. Ross, County Treasurer, 235 Pac. 334; U. S. v. Pearson, County Treasurer, 231 Fed. 270; also cases cited in U. S. v. Pearson County Treasurer, supra, which are followed in that opinion; see also Chapter 10, p. 195, Handbook of Federal Indian Laws, by Felix S. Cohen, foreword by Harold L. Ickes, introduction by Nathan R. Margold, published by the United States Department of Interior.

Sperry Oil & Gas Co. v. *Chisholm*, 264 U. S. 488, 68 L. Ed. 803, 44 Sup. Ct. Rep. 372;

United States v. *7,405.3 acres of land*, (4 Cir. 97 Fed. (2) 416;

United States v. *Corp, of President, etc.*, (10 Cir.) 101 Fed. (2) 156;

Cravens v. *Amos*, 64 Okl. 71, 166 P. 140;

Bunch v. *Cole*, 263 U. S. 250, 68 L. Ed. 290, 44 Sup. Ct. Rep. 101;

Marchie Tiger v. *Western Invest. Co.*, 221 U. S. 286, 55 L. Ed. 738, 31 Sup. Ct. Rep. 578;

Mullen v. *Pickens*, 250 U. S. 590, 63 L. Ed. 1158, 40 Sup. Ct. Rep. 31;

Brader v. *James*, 246 U. S. 88, 96, 62 L. Ed. 591, 595, 38 Sup. Ct. Rep. 285;

United States v. *Brown*, 8 Fed. (2) 564.

3. The holding of the lower court to the effect that under the fact situation here "it is quite clear that the trust in question here was neither resulting nor constructive but an express trust created for the purpose of enabling Mainard, as trustee, to deal freely with the Texas lands, and that in terms and in fact it is directly within both the purpose and the language of the statute (Texas)" is erroneous.

Amey Thlocco was a full-blood, incompetent Indian, a resident of the State of Oklahoma; she was not sui juris, and was incapable of creating a trust. As to her it was a resulting or constructive trust, if any was created.

137 A. L. R. at page 469;

Studebaker Bros. Mfg. Co. v. *Hunt*, (Tex. Civ. App.) 38 S. W. 1134;

Merriman v. *Russell*, 39 Tex. 278, 284;

Restatement of the Law, Trusts, pp. 5, 6, 1244, 1245, 1249;

Restatement of the Law, Restitution, pp. 642, par. 160 (g);

65 C. J., *Trusts, pp.* 223, 224, 225, 363, 740.

(b) Since the res of the trust was funds belonging to Amey Thlocco and lands in lieu thereof, and at the time the purported trust was created (November 15, 1934) the Act of Congress of January 27, 1933 (Appendix, *infra*, p. 19) was in operation, any attempted trust powers vested in Mainard would have to be approved by the Secretary of the Interior. Robertson, United States Probate Attorney, attempted to protect Amey Thlocco in the manner of taking the deed but his instructions were disregarded. However, only with the approval of the Secretary of the Interior could such a trust have been created. Act of January 27, 1933, supra. That approval was not obtained.

4. The holding of the lower courts was erroneous in that it permitted a collateral attack in a Federal court of Texas on a valid existing judgment in Oklahoma.

There is no Federal statutory provision for the appointment of a guardian in a Federal court. Therefore, the appointment of a guardian in an Oklahoma county court was res adjudicata as to a Federal district court, particularly since the question of Amey Thlocco's incompetency had never been raised in a county or a district court of the State of Texas. This precluded a Federal trial judge from striking down the judgment of the Oklahoma county court or making an original finding of fact contrary to that judgment pleaded and proved.

United States v. *Merrell*, (10 Cir.) 140 Fed, (2) 602;[4]

Poorman v. *Carlton*, (Kansas) 253 Pac. 424[5]

Act of May 26, 1790, Title 28, Ch. 17, U. S. C. A. Sec. 2, Art. 3, United States Constitution;

---

[4] **United States** v. **Merrell**, 140 Fed. (2) 602: "A state court having first exercised jurisdiction, its judgment is exclusive of federal jurisdiction and not subject to collateral attack unless the absence of jurisdiction over the subject matter, or lack of power to render judgment, affirmatively appears from the face of the proceedings. * * * A county court's adjudication appointing administrators for the estate of decedent, which judgment was not void on its face, was not subject to collateral attack in a federal court exercising concurrent jurisdiction."

[5] **Poorman** v. **Carlton et al.**, 253 Pac. 424 (Kan.): "Under the provision of the Constitution of the United States, which requires that full faith and credit be given to the judicial proceedings of every other state, a judgment of a court of competent jurisdiction in Oklahoma, declaring an Osage Indian an incompetent person and appointing a guardian for his estate, establishes the status of the Indian which follows him into this state."

Ellis v. *Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327, 27 L. Ed. 1006;

Sutton v. *English*, 246 U. S. 199, 38 Sup. Ct. Rep. 254, 62 L. Ed. 664;

O'Callaghan v. *O'Brien*, 199 U. S. 89, 25 Sup. Ct. Rep. 727, 50 L. Ed. 101.

5. Eliminating the question of restrictions and all Federal questions, the decision of the trial court was erroneous because it divested an incompetent citizen of Oklahoma of property in Texas without ancillary guardianship proceedings as provided by the Texas statutes. Articles 4285-4286, Revised Civil Statutes, Texas. (Appendix, *infra*, p. 64).

Amey Thlocco, a resident of the State of Oklahoma all her life, had been duly adjudicated an incompetent in Oklahoma and full faith and credit should have been given the findings of the Oklahoma court on this point. This is particularly true since the local and public policy of the State of Oklahoma and of the State of Texas is to the effect than an incompetent can only be divested of property by a gurdianship sale.

Redmon v. *Leach*, 130 S. W. (2) 873 (*Writ of error dismissed by Supreme Court with notation "Correct judgment"*);

Martinez et al v. *Guiterrez, et al.*, 66 S. W. (2) 678;

Wilkinson v. *Owens, et al.*, 72 S. W. (2) 330.

The holding of the trial court so far departs from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this court's power of supervision.

6. The decision of the lower courts is erroneous in its interpretation and application of Section 7425a, Revised Civil Statutes of Texas, (Appendix, *infra*, p. 65) because said statute contemplated a legal trust created by one sui juris. The trust here was neither a legal trust nor one created by a person sui juris. Amey Thlocco, a restricted full blood Indian, legally adjudged an incompetent person, could not and did not create the trust in question and the decision erroneously holds that here was created an express trust. Robertson, the United States Probate Attorney, testified (R. 228, 229) that Amey was not consulted when the deed to Mainard was executed, had no part in the creation of the trust, did not have the mental capacity to know the meaning of a trust and would not have known how to create a trust had she been consulted.

If a trust resulted from the acts of other parties, Mainard could only have been a resulting or constructive trustee, in which event the Texas laws of notice would not apply and the case of Gulf Production Company v. Con-

tinental Oil Company, 132 S. W. (2) 553, 164 S. W. (2) 488 has no application here.[6]

Cage v. Eastburn & Company, 23 S. W. (2) 65;

McWhorter v. *Oliver*, 2 S. W. (2) 281;

Woodall v. *Adams*, 7 S. W. (2) 922;

Grand Court of Order of Calanthe of Texas v. *Ebeling*, 129 S. W. (2) 715;

Rodriguez v. *Vellejo*, 157 S. W. (2) 172.

7. The opinion of the trial court as affirmed by the Fifth Circuit Court was erroneous in its application of Section 7425a, Revised Civil Statutes of Texas (Appendix, *infra*, p. 65), to the fact situation here, in that said section was never intended to permit a trustee to transfer lands of an incompetent who was incapable of creating a trust. Such a construction of the Act would create a means for gross fraud in depriving innocent persons of their property as illustrated here. The decision in applying said Section 7425a is to thwart the public

---

[6] The Texas Constitution requires the Texas Statutes to be codified under separate and distinct titles. All statutes governing the relations between guardians and wards are contained in Title 69 of the Texas Code entitled "Guardian and Ward." Article 7425a is incorporated into Title 125a captioned "Trustees". No Texas court has ever held that Article 7425a applies to estates in wardship. Manifestly, Article 7425a does not apply to Trustees ex maleficio. Moreover, the Supreme Court of Texas has recently held it **Neblett v. Valentino**, 92 S. W. (2) 432, that one who purports to act as a Trustee for a ward assumes the statutory obligations of a guardian. Finally, the Texas Courts have repeatedly held that trusts created to thwart the public policy of the State as defined in the Statutes are absolutely void and unenforceable. **McCamey v. Hollister Oil Company, et al.**, 241 S. W. 689.

policy of Texas by permitting the transfer of an incompetent's property without a proper guardianship sale.[7] This is contrary to the local and state policy. The case relied upon in the decision, *Gulf Production Company* v. *Continental Oil Company, supra,* is not applicable.

American Surety Co. of New York v. *Fitzgerald,* 36 S. W. (2) 1104;

Neblett v. Valentino, 92 S. W. (2) 432;

Wilkinson v. Owens, et al., 72 S. W. (2) 330;

Kelsey v. *Trisler, et al.,* 74 S. W. 64;

Jones et al v. *Sun Oil Company, et al.,* 153 S. W. (2) 571;

Gulf Production Co. v. *Oldham et al.,* 274 S. W. 238;

Pure Oil Co. v. *Clark,* 56 S. W. (2) 852;

Texas & N. O. Ry. Co. v. *Jones,* 103 S. W. (2) 1043.

8. The decision of the trial court is erroneous in holding that under the fact situation here an express was created. If the court had correctly defined the purported trust as a resulting or constructive trust, then Magnolia could not have been an innocent purchaser under the decisions of the Texas state courts and Federal

---

[7] Chapter 13, Title 69, Articles 4285 ss, Texas Statutes, permit duly appointed foreign guardians to qualify in Texas. If the foreign guardian does not choose to take advantage of Article 4285, such foreign guardian, or others interested may procure appointment of an ancillary guardian of the Texas estate of the ward, perforce of Article 4132.

courts, and the Circuit Court's opinion should have reversed the trial court. The following Texas cases have applied Section 7425a, *supra*, to fact situations involving resulting or constructive trusts:

McWhorter v. *Oliver*, *supra;*

Woodall v. *Adams*, *supra;*

Cage v. *Eastburn & Company*, *supra;*

Grand Court of Order of Calanthe of Texas v. *Ebeling*, *supra;*

Rodriguez v. *Vellejo*, *supra.*

The following cases lay down the rule that one who purchases trust property with actual or constructive notice of the trust is held to the same liability as the original trustee and as the statutes of limitation will not run in favor of a trustee they will not run in favor of a purchaser:

Houston Oil Company v. *Hayden, et al.*, 135 S. W. 1142;

Worst v. *Sgitcovich*, 42 S. W. 72;

Briggs v. *McBride*, 190 S. W. 1123;

Lewis v. *Castleman*, 2 Tex. 422;

Humble Oil & Refining Co. v. *Campbell*, 69 Fed. (2) 667;

Baker v. *Schofield*, 243 U. S. 114, 61 L. Ed. 626.

9. The trial court found that Amey Thlocco by her acts ratified the oil and gas lease in question. The Circuit Court merely stated that it was not necessary for that appellate court to discuss or consider this question for "we think it plain that whether this contention be sound or unsound, it is quite clear that the judgment must be affirmed on the showing and findings made of record and limitation title in plaintiff". The trial court's decision as affirmed by the Circuit Court was erroneous because an incompetent full blood Indian could not have ratified the oil and gas lease on the lands in question whether the lands were restricted or unrestricted, and no personal acts of hers would have worked an estoppel.

19 Am. Jur. 637;

Vol 4, Words and Phrases, Second Series, p. 127;

Ewert v. *Bluejacket*, (8 Cir.) 259 U. S. 128, 66 L. Ed. 858;

Kendall v. *Ewert*, (8 Cir.) 259 U. S. 137, 66 L. Ed. 862;

Whitchurch v. *Crawford*, (10 Cir.) 92 Fed. (2) 249;

Wilkinson v. *Owen, et al.*, 72 S. W. (2) 330.

The trial court in its findings and the Circuit Court in its affirming opinion refer to suits brought by Amey Thlocco in the Federal court in Oklahoma for the pur-

pose of making Mainard account to her as trustee, resign as guardian, and to make transfers to her on the Texas lands. In one of these suits other defendants than Mainard (but not Magnolia) were named. These cases were designed to unhorse Mainard who proved to be faithless to his trust as guardian and as trustee. Compromise settlements were entered into in these cases in the Oklahoma Federal court (R. 171, 180). The stipulation of settlement (R. 180) contained a clause[8] protecting Amey in any other suit that might arise. Likewise the Federal district court in Oklahoma entered a savings clause[9] to protect Amey (R. 209), which saving clauses were wholly ignored by the trial court and the Circuit Court.

---

[8] "That neither the approval and acceptance of this offer of compromise, nor the accounting to be had as herein provided, shall in anywise prevent, prejudice or estop the said Amey Thlocco, by guardian or next friend, or the Government of the United States in her behalf, from instituting or maintaing any action, suit or proceeding to recover any property, funds or interest therein lawfully belonging to her other than the above described 65-acre mineral intrest conveyed to J. B. Terry as aforesaid and the decree to be entered herein shall expressly so provide." (R. 180)

[9] "It is Further Ordered that the judgment of this Court shall in no respect affect the rights of the said Amey Thlocco, an incompetent, her present guardian, and guardian ad litem, or the United States of America from maintaining or instituting any other suit, or suits, affecting the estate or properties of the said Amey Thlocco, an incompetent, regardless of where said estate or properties may be situated; and that the judgment of this Court shall in no respect be construed as res adjudicata." (R. 209)